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**Phase II Permittees' Overarching Issues with the
2013 MS4 Phase II Stormwater General Permit Renewal Process**

A. Introduction

The Colorado Stormwater Council (Council), which represents 98.3% of the Permitted MS4s in the State (excluding Non-Standard MS4 Permittees), appreciates the Water Quality Control Division's (Division) willingness to set an additional stakeholder meeting to provide the Council with the opportunity to present the Division with our concerns with the Division's current endeavor to rewrite the Statewide MS4 General Permit (#COR090000/#COR080000). Several of these concerns have been previously provided to the Division in letters from the Council dated January 28, February 15, February 16 and March 18, 2013, as well as in numerous verbal communications. The Council is also aware the Keep It Clean Partnership sent a letter of concerns to the Division. It is important to the Council to raise these issues again as they have not yet been adequately addressed.

The Division has held a series of meetings with Phase II permittees to present its general concepts for Permit language changes and additional new Permit requirements. While the Council greatly appreciates the opportunity to provide feedback on these concepts, the information provided by the Division was so general that permittees found it difficult to provide the Division with meaningful comment for most of the concepts presented. In addition, the Division has not provided the permittees with any factual foundation or data in support of the proposed broad sweeping permit changes, as repeatedly requested by permittees. The Council is still unclear on what specific issues impacting water quality have been identified and how the Division's concepts for Permit revisions will actually result in improved water quality.

B. Background

1. The 2012 Targeted Permit Questionnaire

The Division has stated that it has identified areas in the current Permit which it feels need clarified or strengthened. The Division cites the completed audits of some Phase II Permittees and the 2012 Targeted Permit Questionnaire completed by those permittees which were not audited as its support for rewriting the current Permit.

The results of the Targeted Permit Questionnaire have been cited on numerous occasions by the Division as a driving force for its decision to rewrite the current Permit. Phase II permittees have requested on numerous occasions, both verbally at meetings and in writing, that the questionnaire

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results and the analysis of those results be made available so that permittees may gain a better understanding of the issues the Division has identified. The Division stated that it did not compile all questionnaire responses into one document and has not summarized all responses to develop its findings. The Division has provided the permittees with what it found to be only general trends in the Permit program areas addressed by the questionnaire. When Division Staff cite findings from the questionnaire to justify changes to the current Permit, they have used phrases such as “many” or “some” permittees do not appear to meet the current Permit requirements. It would be helpful to the permittees if the Division would provide actual analyses of the questionnaire and audits so the Council and MS4 Phase II permittees can provide thoughtful and meaningful feedback on the perceived problems. The Division’s analyses would enable the permittees to determine if the perceived issues are pervasive throughout all permittees’ programs or if there are only a few permittees’ programs that appear to be out of compliance. Permittees are concerned that the more prescriptive Permit language concepts presented may be an excessive reaction to a few instances of non-compliance which should be addressed on an individual basis rather than with broad Permit changes.

2. The Current MS4 General Permit

The Rationale for the current Permit states in the fourth paragraph of III.A. on page 6 that *“The Division has intentionally not provided a precise definition of MEP [Maximum Extent Practicable], in order to allow maximum flexibility in MS4 Permitting. MS4s need the flexibility to optimize reductions in stormwater pollutants on a location-by-location basis. The pollutant reductions that represent MEP may be different for each small MS4, given the unique local concerns that may exist and the different possible pollutant control strategies. Therefore, each Permittee will determine appropriate BMPs to satisfy each of the six program areas through an evaluative process.”* It is evident from dialogue during the MS4 Permit Renewal meetings that the Division is moving away from this philosophy.

C. The 2013 MS4 Permit Renewal Process

This renewal process varies greatly from previous MS4 Permit renewal efforts during which the Division collaborated and worked cooperatively with permittees to identify problems in the permit that resulted in water quality impairment and to develop cost effective and flexible solutions. This process seems all too similar to that of the Light Industrial, Heavy Industrial, and Recycled Materials Combined Permit process. During that process the Division created a 113-page Permit without any stated purpose or need and without first conducting a cost-benefit analysis. The Council seeks to ensure that the Statewide MS4 Phase II General Permit rewrite does not result in the same issues facing the Light Industrial, Heavy Industrial, and Recycled Materials industry with their recently rewritten Permit.

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1. The Relationship between the State and Local Government

The Division is called upon to give great deference to Governor Hickenlooper's Executive Order D 2011-005 and sections of the Administrative Procedure Act during this MS4 Permit renewal process.

a. Executive Order D 2011-005

As the Division knows, Executive Order D 2011-005 was created "to enhance the relationship between State and local government", and "requires state rule making agencies to consult with and engage local governments prior to the promulgation of any rules containing mandates." Although the concepts for the MS4 Phase II General Permit rewrite do not necessarily require a rule change, the Council is concerned that many of the concepts Division staff has suggested for incorporation into the Permit clearly violate the *spirit* of Executive Order D 2011-005.

Section II A. of Executive Order D 2011-005 states; *"To the extent authorized by law, no state agency shall promulgate any regulation creating a mandate on local governments unless:*

1. The mandate is specifically required by federal or state law;
 2. The agency consults with local governments prior to the promulgation of the regulation;
- and
3. The state government provides the funding necessary to pay for the direct cost incurred by local governments in complying with the mandate.

As it relates to Section II.A.1, several concepts presented by Division Staff are not required by State or Federal law. Division Staff have repeatedly described that the need for a Permit rewrite stems from the Division's desire to make programs more auditable rather than the need to meet Federal or State mandates. In this regard, the Division must be able to answer the following questions to justify its desire to revise the current Permit:

1. What specific provisions of Federal or State law does the current Permit fail to cover?
2. Of those specific provisions, what specific permit language change does the Division recommend to meet those deficiencies?

With respect to Section II.A.2, the consultation with permittees has been problematic from the start of the Permit renewal process. Although the Division has held several "MS4 Permit Renewal meetings", those meetings have been formatted in lecture style where Division Staff presents general "30,000 foot-level" concepts and then asks for a "show of hands" poll on agreement of the concepts. Moreover, there were not enough meetings scheduled to cover the number and scope of concepts proposed by the

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Division. The compressed schedule also limited permittees' ability to review the large amount of information provided and did not allow permittees' adequate time to collaborate with the Division on possible alternatives. At each meeting, permittees requested more specific information from the Division to better understand the concepts presented in order to provide proper feedback to the Division. Such additional information included a copy of the Division's analyses of the MS4 Phase II Program Audits and Targeted Permit Questionnaire responses that showed systemic problems with the current Permit and which has served as the cited catalyst for the proposed Permit rewrite.

As it relates to Section II.A.3 of Executive Order D 2011-005, the Order calls on the Division to minimize the imposition of new costs on already-strained local budgets. Consistent with the Governor's Order, the Council has worked to achieve water quality goals with the flexibility needed at the local level to achieve these important goals. The Council is confused why the Division is seeking to make significant changes to the current permit that promise to entail significant extra cost implications. It is not reasonable for the Division to expect every permittee to expend their limited resources to implement additional program requirements without the Division first making a determination that the requirements are necessary to promote state and local government goals of protecting and enhancing water quality. To our knowledge there has not been a comprehensive cost-benefit analysis conducted that identifies both internal costs to the Division and the costs to MS4 Permittees required to implement the new mandates.

b. The Administrative Procedure Act

The Administrative Procedure Act is also pertinent to the MS4 Permit rewrite, setting forth the basis requiring the Division to supply evidence and data in support of the Permit changes and a cost-benefit analysis of the effect the changes will have on permittees.

Title 24 , Article 4 of the Colorado Revised Statutes governs "Rule-making and Licensing Procedures by State Agencies", C.R.S. §24-4-101.5 titled "Legislative declaration" states:

"...It is the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of continuing agency actions to determine whether the actions promote the public interest."

In addition, C.R.S. §24-4-103(1.5) states:

"If an agency reinterprets an existing rule in a manner that is substantially different than previous agency interpretations of the rule or if there has been a change in a statute that affects the interpretation or the legality of a rule, the office of legislative legal services shall review the rule in the same manner as rules that have been newly adopted or amended under paragraph

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(d) of subsection (8) of this section upon receiving a request for such a review of the rule by any member if the general assembly.”

And C.R.S. §24-4-103(2.5) (a)(III) provides that:

“The anticipated costs of the rule or amendment, which shall include the direct costs to the government to administer the rule or amendment and the direct and indirect cost to business and other entities required to comply with the rule or amendment.”

Finally, C.R.S. §24-4-103(2.7) (b) requires that:

“No agency shall promulgate a rule creating a state mandate on a local government unless the agency complies with the requirements of section 29-1-304.5 C.R.S.”

Based upon the statutory requirements set forth above, prior to revising the current Permit, the Division should answer the following questions:

1. How will the Division develop a specific comprehensive cost-benefit analysis that sufficiently details the cost for requirements that are mandated by Federal or State Law and for those optional requirements proposed by the Division?
2. How will the Division provide the necessary funding to permittees for implementation of the optional requirements?

c. An Example of Lack of Transparency in this Permit Renewal Process

The Division’s proposal to require monitoring as part of the MS4 Phase II General Permit is a good example of the lack of transparency in this renewal process. Although there were several meetings starting in November of 2012, including a “kick off” meeting in which the Division gave an overview of the topics to be discussed at the subsequent meetings, the monitoring program requirement was not revealed until just five days before the last scheduled meeting. The Division stated in their March 18, 2013, agenda:

“The Division would like to provide transparency to the MS4 group and convey recent Division discussion regarding monitoring. The Division currently is proposing monitoring for Phase II Permittees. The monitoring outfalls and frequency being considered would be modeled after the requirements in the Colorado Springs MS4 Permit (e.g., 4 samples per outfall and generally only applicable to specific outfalls based on size and dry weather flow rate.)”

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An issue involving the magnitude and potential cost of monitoring deserved a substantially greater level of “transparency”.

Based upon the above, prior to revising the current Permit, the Division should answer the following questions in order to provide the Council with its assurances that the Division will conduct this Permit renewal process in the spirit of Executive Order D 2011-005 and in accordance with the Administrative Procedure Act:

1. What is the Division’s specific plan to work cooperatively with the permittees to provide a greater level of cooperation, input, and transparency?
2. Please provide the Council with the “description of the nature and extent of the Division’s consultation with representatives of the local governments that would be affected by the proposed mandate, the nature of their concerns, any written communications or comments submitted to the agency by such local government, and the agency’s reasoning supporting the need to issue the regulation containing the mandate”.
3. How does the Division specifically plan to solicit meaningful and timely input of elected officials and other representatives of local governments into the development of regulatory proposals affecting local governments?

2. The Division’s Apparent “One Size Fits All” Approach

Permittees have expressed concern that the more prescriptive Permit language concepts proposed appear to be approaching a “one size fits all” philosophy within the Division. The appearance of concepts such as monitoring and secondary containment at municipal facilities, taken from the Colorado Springs Phase I Permit, support Phase II permittees’ concerns as does the inclusion of specific permit requirements for inspections frequency, inspection scope and documentation that would apply to all permittees regardless of their individual situation. More prescriptive Permit language limits the flexibility permittees need in order to meet Permit requirements in a manner that is the most suitable for their communities and allows them to use their limited resources to protect and improve water quality in the most effective way. The Division has stated on many occasions its desire for Permit language that contains conditions and requirements that are easier for the Division to audit. Many of the general concepts presented by the Division would result in making the Permit more prescriptive by adding the requirement for all permittees to meet specific non-numeric effluent limits. While this approach may allow the Division to use a checklist approach when auditing programs, it limits permittees’ flexibility to administer the best practices and control measures for improving water quality in the most efficient and effective manner. The Council feels that the concept of blanket prescriptive requirements, which would entail significant administrative work for permittees, will not result in tangible water quality benefits. The time, resources, and expense required to meet these administrative

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requirements would be better applied to the implementation of program elements that would actually protect and enhance water quality.

a. The Council's February 19, 2013 Request

At the February 19, 2013 MS4 Permit Renewal Meeting, Nathan Moore accurately recapped permittees' request of the Division in drafting the revised Permit:

1. Minimize the Permit changes
2. Consider permittees' staff and work load when developing a compliance schedule, and
3. Ensure that proposed changes are directly related to improved water quality rather than ease of auditability.

At the February 19 meeting, permittees heard that the proposed changes should only increase the burden of compliance for those MS4s that are already noncompliant and that those with good programs should not be overly burdened by any Permit language changes or new requirements.

b. The Division's Apparent Reaction to the Council's Requests

However, it has become apparent to permittees through the concepts presented at subsequent Permit renewal meetings that the Division is intent on moving forward with its revised Permit without consideration of permittees' February 19 request. The proposed increased documentation and non-numeric effluent limitations alone will significantly decrease permittees' flexibility while potentially adding substantial costs to the implementation of their programs without providing any tangible benefits to water quality.

c. **RESPONSES NEEDED BEFORE REVISING THE CURRENT PERMIT**

Based upon the above, the Council respectfully requests that the Division answer the following questions before making any further changes to the current permit:

- 1. What specific issues with the current permit are driving the need to rewrite the Permit? For each issue, describe what needs to be accomplished in the Permit rewrite to address the issue. Please identify which issues can be addressed through clarification of existing Permit language and which need to be addressed by a new requirement. Please provide the justification for any new requirements.**
- 2. How will the proposed changes in Permit requirements specifically improve water quality?**

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3. **Please provide the Council and its members with analyses of the Division's findings from the prior MS4 Phase II program audits and the 2012 Targeted Permit Questionnaire. Again, the analyses is critical in allowing permittees to understand the Division's concepts for Permit changes and in providing constructive and useful feedback on these concepts.**

3. The Division's Proposed Changes to the Current Permit

- a. The Addition of a Monitoring Program Requirement

As to the suggested new goal of requiring dry-weather monitoring as part of the Permit rewrite, the Division stated: "The Division seeks to have scientific data-driven decisions to address water quality impairment." No Federal or State laws specifically require Phase II Permit holders to implement a monitoring program. Division Staff stated in their March 18, 2013, agenda that the authority for the Division to require monitoring relies on Section 61.8(4) of Regulation 61 which states: "Any discharge authorized by a discharge Permit **may** be subject to such monitoring, record-keeping, and reporting requirements as may be reasonably required in writing by the Division..." Although Regulation 61 **may** allow the Division to require permittees to conduct monitoring this proposal is not necessarily reasonable nor does it meet the spirit of Section II.A.1 of Executive Order D 2011-005 which does not allow any mandate unless that mandate is "specifically required by federal or state law."

The proposed monitoring requirements are a drastic departure from the current Permit language which states in Part I D(8) that: "The Division reserves the right to require water quality sampling and testing, on a case-by-case basis. Monitoring may also be required if a stormwater-based TMDL and WLA have been put into place for any waterbody into which the Permittee discharges." The Division has argued that they believe it makes more administrative sense to include monitoring requirements in the MS4 Phase II Stormwater General Permit, for purposes of gathering data in relation to *potential* TDMLs or WLAs, rather than address such requirements on a case-by-case basis for MS4s discharging to a 303(d) listed stream segment. It is confusing to see that in December 2012, TMDL development was delayed because of limited Division staff resources and now the Division is moving forward by proposing the Phase II permittees assume the potentially significant cost of monitoring for TDML development. Many of the MS4 Phase II permittees do not have the resources (time, money and staff) to accomplish the proposed TDML development monitoring. Furthermore, Division Staff have readily admitted they have not yet determined how many MS4s would potentially be affected by the new requirements.

The Division has never reviewed the monitoring data required from Phase I permittees that has been collected for the past 15 years. The Division removed dry weather screening from Phase I Permits after the first five years of implementation, acknowledging that this was an expensive and ineffective program with goals that could be achieved through other means. The Council is concerned the proposed monitoring requirements will be costly and will not provide any useful information, especially

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in light of the Division's previous determinations regarding dry weather flows and the fact that the Division does not have an analysis of existing monitoring data that can justify any new requirements. Stakeholder outreach from the Division in regards to the necessity and justification for the addition of new monitoring requirements has been extremely limited, and its surprise introduction at what was to be the last stakeholder meeting is perplexing at best.

Based on the above, the Council requests the Division respond to the following questions prior to adding a monitoring program requirement to the Permit:

1. Federal stormwater regulations only require monitoring for Phase I permittees. What specific factual foundation or data can the Division provide in support of the requirement that Phase II permittees develop a potentially expensive monitoring program?
2. What data does the Division expect to obtain from the suggested monitoring programs and how will the Division use this information to make scientific data-driven decisions to address water quality impairment?
3. Has the Division attempted to identify any existing programs that might be used in place of an expensive monitoring program, such as the Illicit Discharge Detection and Elimination Program (MCM #3 – IDDE)? If yes, what process was used to analyze such programs? If no, what specific steps would the Division take to identify possible cost effective alternatives?

The Council would also like to address issues with the Division's concepts for Permit changes within the Program Document Description and each Minimum Control Measure (MCM). Each is addressed below.

b. Program Description Document

During the course of the MS4 Permit Renewal stakeholder meetings the Division presented several issues staff had identified with the current Permit in regards to documentation of the permittees' programs. Division Staff felt that the documentation was not thorough or detailed enough for them to conduct consistent and meaningful audits and that the requirement for permittees to submit their programs and any changes to the Division to review for adequacy and approval was cumbersome and inefficient. The Division presented several concepts for revised requirements to the Program Description Document including eliminating the requirement that Program Description Documents and changes be submitted to the Division. Instead the MS4s will maintain the document and make it available upon request from the Division. This change is an attempt by the Division to manage its limited resources and instead focus on performing audits. While we acknowledge the resource problems faced by the Division we think the suggested change is for the benefit of the Division, potentially at the expense of the MS4s.

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The Division also introduced the concept of non-numeric effluent limitations (prescribed specific elements and/or activities used to meet program requirements within the Permit) to address the Division's limited abilities to review permittees' program submittals and subsequent program changes. The Division has indicated the new Permit requirements would be formatted as a check-list for both the permittee and the Division for the Division's ease of auditing.

The Council appreciates the Division's attempt to clarify requirements in regards to the Program Description Document but believe that the concepts, as presented, will result in more time spent on administrative tasks than in implementing programs which will result in improved water quality. Permittees are concerned that including non-numeric effluent limitations in the form of prescribed specific elements and/or activities will severely limit their ability to be flexible in administering program elements in a way that best benefits each community.

c. MCM Specific Questions

With respect to each Minimum Control Measure (MCM) discussed in more detail below, the Division has not responded to the Council's questions and prior requests for information necessary to allow the Council to determine whether or not a Permit modification is necessary and justified. The questions are restated below:

1. What specific problems with the current Permit language for each MCM, resulting in water quality impacts, has the Division identified that necessitates a rewrite of the existing Permit?
2. What are the specific problems with the current Permit language that does not allow the Division to pursue enforcement?
3. For each MCM: what, if any, specific data from the analysis of the MS4 Phase II Program audits showed systemic findings that resulted in water quality impacts?
4. For each MCM addressed by the Targeted Permit Questionnaire: what, if any, specific data from the analysis of the Questionnaire identified systemic findings that resulted in water quality impacts?
5. What follow-up actions to the Targeted Permit Questionnaire have been taken by the Division for those permittees whose answers indicated they were out of compliance?

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6. Understanding that the Permit rewrite will require substantial programmatic changes, what data has the Division utilized as a basis to show an increased water quality benefit from the specific Permit modification concepts presented for each MCM?
7. What factual, technical, cost-benefit, or other analysis has been performed by the Division to ensure that implementation of the Permit modifications related to an already successful program will not place an undue burden on the permittees?

i. MCM 1. Public Education and Outreach on Stormwater Impacts:

The Division's concepts for Permit requirement changes concerning Public Education and Outreach primarily revolve around the inclusion of non-numeric effluent limitations in the form of a chart or table of prescribed activities the permittees may choose from to meet their outreach goals and the documentation of these activities. Concepts for meeting requirements from Regulation #85 (Nutrients) have also been presented. The Division provided a potential list to be included in Permit requirements addressing sources to be targeted with the nutrient outreach material.

The Council is concerned that inclusion of specific, prescribed elements and activities in the Permit will severely limit their flexibility to implement programs which will best fit their community and may prohibit creativity and initiative to develop new, more effective outreach programs.

ii. MCM 2. Public Participation/Involvement:

The Division has not presented any changes to this Minimum Control Measure.

iii. MCM 3. Illicit Discharge Detection and Elimination (IDDE):

The Council has concerns regarding recent proposals from the Division pertaining to the MS4 Permit Minimum Control Measure #3, Illicit Discharge Detection and Elimination (IDDE). It is our opinion that the existing IDDE programs are quite effective at detecting and eliminating illicit discharges, and the Division's concepts for additional documentation, re-statement of existing procedures, impractical database requirements, removal of flexibility (i.e., eliminating the provision in the current Permit which allows permittees to develop a list of occasional incidental non-stormwater discharges not addressed by Part I.B.3.(a)(5) – second paragraph), and the requirement for unnecessary escalation of enforcement do little to mitigate water quality impacts and may in fact place an undue burden on the permittees. The existing approach, supported by the current Permit language, has resulted in many successful IDDE programs.

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Based on the above, the Council requests responses by the Division to the following questions prior to the Division revising the current Permit:

1. Why would the Division eliminate the ability for permittees to develop a list of occasional incidental non-stormwater discharges which provides critical flexibility for permittees and replace it solely with a Low Risk Discharge designation?
2. What specific data from the Division's analysis of the Questionnaire and MS4 Phase II Program audits showed systemic findings that resulted in identifiable water quality impacts from issues with the language in the current permit concerning tracing of illicit discharges, documentation, and training?
3. What specific responses from the Questionnaire or audits indicate that the current recordkeeping systems are inadequate? What evidence or analysis has the Division completed to support the notion that centralized recordkeeping would be more effective? What evidence is available to show that making an IDDE database *accessible* to partner entities in the interest of coordination would be sufficient?
4. What specific data supports the need for a plan of 'escalation of enforcement' for what may be a one-time improper discharge incident that does not require additional enforcement efforts once resolved?

iv. MCM 4. Construction Site Runoff Control:

The Council has concerns regarding the concepts presented by the Division pertaining to this program. The Division has suggested various Permit rewrite concepts ranging from implementing enforcement responses where "Penalty = Pain," to mandating specific requirements for inspection frequency and inspection report formats. The proposed modifications to the Permit appear to be far reaching and would likely result in extensive modifications to established programs of Phase II MS4s throughout the State. For example, one proposed change presented by the Division is the requirement of a web page listing construction site violators. The Division has not presented any documentation relating to quantifiable behavioral changes that can be achieved by implementing a "violators" web page. Additionally, the concepts presented by the Division for Permit modifications have the potential for creating legal concerns and/or liabilities for the permittees once implemented (i.e. posting violators on a web page may create legal liabilities previously not considered).

Based on the above, the Council requests responses by the Division to the following questions prior to the Division revising the current Permit:

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1. Which of the proposed modifications is the Division making to the Division's Construction Discharges Associated with Construction Activity program/Permit? What is the timeframe for implementation of those modifications and how will those modifications affect MS4 Construction Site programs?
2. How do the concepts presented by the Division ensure that non-structural BMPs can continue to be used to control the discharge of pollutants from construction sites? The discussions to date have indicated that the Division is leaning towards prescribing structural BMPs.
3. Many of the suggested concepts prescribe actions that must take place for all reviews of plans, inspections, and enforcement actions. How will the Permit language allow site-specific factors to be considered and implemented into the permittees construction programs?
4. How do the suggested concepts recognize that flexibility is necessary to effectively implement the Permit requirements in light of the many different types of construction programs operated by permittees? There are many alternative approaches to construction site programs that allow permittees to effectively utilize their available resources.

v. MCM 5. Post-Construction Stormwater Management:

The Division presented several concepts for Permit changes in regards to the Post-Construction program which ranged from requiring design standards for New Development and Redevelopment based on the Water Quality Capture Volume to requiring a plan review or as-built plans on all development/redevelopment to ensure that permanent water quality control measures meet a standard and are installed and maintained correctly. The Council has concerns regarding a general lack of permittee outreach by the Division in regards to MCM #5. The Division had scheduled a meeting for March 18, 2013 in which they planned to specifically discuss MCM #5. On March 11, 2013 the Division, without prior notice, removed MCM #5 from the agenda and replaced it with a proposal to require monitoring as part of the MS4 Phase II General Permit. The Division did not reschedule or add an additional meeting to discuss MCM #5. Due to this lack of outreach permittees are unsure as to the direction that the Division might be headed in the rewrite of the Permit for MCM #5.

Based on the above, the Council requests responses by the Division to the following questions prior to the Division revising the current Permit:

1. What specific changes have the Division created, or plan to create, to the language/requirements within MCM #5?

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2. Will non-structural BMPs be included in the concepts for MCM #5 being considered by the Division?

vi. MCM 6. Pollution Prevention/Good Housekeeping for Municipal Operations:

The Division presented concepts for both Permit language changes and new requirements for municipal operations during the MS4 Permit Renewal meetings. Division Staff apparently feel that aspects of this program area are weak because there are no clear non-numeric effluent limitations. Division Staff suggested using the language from the Colorado Springs Phase I Individual Stormwater Permit concerning municipal operations in the Phase II General Stormwater Permit. These requirements include the development and implementation of Municipal Facility Runoff Control Plans (MFRCPs) for specific types of municipal facilities and secondary containment for bulk storage of petroleum products and liquid chemicals. The Division also presented concepts to meet the nutrient requirements for municipal facilities from Regulation #85 which include the identification, evaluation and documentation of municipal facilities that may contribute nutrients to receiving waters and the development and implementation of an operations program to prevent or reduce those contributions.

The Council is concerned about the use of Phase Individual Permit language in the Phase II General Permit because Phase I Permits are individually tailored to the specific permittee. The language may not be applicable to or feasible for all Phase II permittees. In addition, all Phase II permittees were required to complete a One-Time Operating Procedures Report by December 31, 2009 and to submit that report to the Division by March 10, 2010. This report required permittees to “develop and maintain written procedures for the implementation of an operation and maintenance program to prevent or reduce pollutants in runoff from the permittee’s municipal operations. The program must specifically list the municipal operations (i.e., activities and facilities) that are impacted by this operation and maintenance program. The program must also include a list of industrial facilities the permittee owns or operates that are subject to separate coverage under the State’s general stormwater Permits for discharges of stormwater associated with industrial activity”.

Based on the above, the Council requests responses by the Division to the following questions prior to the Division revising the current Permit:

1. Why is it necessary to require an additional level of documentation in the form of a Municipal Facility Runoff Control Plan when written procedures for permittees’ operations and maintenance programs are already required?
2. Why does secondary containment for bulk liquids need to be prescribed in the Permit rather than addressed through the permittee’s program?

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Conclusions:

Many of the topics identified by the Division for the rewrite of the Permit are duplicative of the Targeted Permit Questionnaire, which had the goal to “achieve broad-based compliance among all permittees”. During this Permit renewal process, the Division has not clarified what issues are still pending after permittees have made all of the program modifications identified in the Questionnaire. There appears to be more explanation and examples needed to fully understand the nuances in the program areas and the Division’s expectations. Many of the concepts presented by the Division appear to be better suited for a guidance document rather than rewriting the Permit.

The Council finds the Division’s willingness to openly discuss the necessity and justification for the concepts for the Permit rewrite has been limited. The Division has identified several areas that would cause significant modifications to existing MS4 program models, which could result in increased cost and complexity of compliance. Yet, the Division has provided limited specific data to support its reasoning for the changes or the direct benefit to water quality. Without a valid basis, besides ease of auditing and providing a stronger case for enforceability on the Division’s part, it is difficult for the Council to understand why changes are being made to the current Permit and how to provide thoughtful, meaningful feedback to the Division. It is crucial that the Division consider and respond to the questions presented in this document in order for permittees to present the concepts and the Division’s reasoning for Permit changes to our elected officials who are very interested and concerned about the potential additional resources the concept changes may require.

The Council desires to cooperate and provide specific permit language in response to the conceptual changes the Division has presented, but feels the truncated time frame and the lack of responsiveness to specific information requested from the Division precludes the Council from doing so.

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